CONSIDERATIONS

TOUCHING

The Great Question

OF THE

KING'S RIGHT

IN

DISPENSING

Simon WITH Harcourt

The Penal Laws.

WRITTEN

On the Occasion of His Late Blessed Majesties granting Free Toleration and Indulgence.

BY

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Late of the Inner Temple, Esq;

LONDON:

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XUM

TO THE

KING.

SIR,

THE Piety *of a* Son *to the* Memory *of ſo* Good *a* Father, *may, I hope, in* ſome *meaſure excuſe my* Preſumption *in* laying *this* Part *of his* Remains *at Your* Sacred Feet. *And* what *will farther* plead *for* me *is, my* ſeconding his *Intentions in* Offering that *to Your* Majeſty, *which* he *(as he often told me) deſign'd* more immediately *for Your* Royal Conſideration.

I am Senſible this Subject *may be thought to be* here handled *with too much* Modeſty; *But I am alſo Senſible that the* Iniquity of thoſe Times *would not bear with* bolder Truth and Reaſon: *Yet I may with Confidence aver, if* he *be* duely weigh'd *he will be found to have*

Asserted the Prerogative *with the* Strength *of the* Law, *and the* Duty *of a* Loyal Subject.

SIR,

When This *was preparing, a* Malevolent Faction *would have made* the *very* Laws Rebellious, *and to* spurn *against their* Maker. *Yet since* Divine Providence *has plac'd* Your Majesty *as* Glorious *at the* Head *of* Your Laws *as at the* Head of your Armies, *I have only to* Pray *for the* Continuance *of Your* Happy Life *and* Reign, *as being*

SIR,

Your Majesties Loyal Subject

and most Dutiful Servant

R. LANGHORNE.

CONSIDERATIONS

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OF THE

KING'S RIGHT

In Dispensing with

The Penal Laws.

THose who assert the Affirmative in this Question, do premise these following Rules or grounds, which they take to be so clear, either from right Reason, common Experience, or the Traditional Common-Laws, which are handed to us by such Resolutions of the Ancient Sages of our Laws, as are found in our Law-Books; That if they be refused by any, the Title of Principles, yet they are easily proveable to Lawyers to be of the like nature with Principles, in that Science which most properly judge of this Question.

I. That there is a difference between *Malum in Se*, which is in its own nature an Offence, and *Malum Prohibitum*, which being in its own nature Indifferent, comes only to be an Offence because some Law makes it so. 11. *H.* 7. *fol.* 11. 13. *H.* 7. *f.* 8.

II. That no Power upon Earth can give License for the doing or dispensing with the doing of what is *Malum in Se*, *Malum Prohibitum* may be Licensed. *Cooke Lib.* 12. *fol.* 30.

Note Suspension, Dispensation *and* License, *do in this Question signifie the same thing.*

III. That the King cannot Repeal, or totally make void, a Law by his own Single Power without a Parliament.

IV. That

IV. That Dispensation (whether it relate to the Generality, or to particular Persons only) is no other thing, than barely a Relaxation, Toleration, or Licensing of a *Malum Prohibitum* for a time, with respect to Advantage or Necessity. This is the definition given *Cooke lib.* 11. *fol.* 88. in the case of *Monopolies*.

V. That the End of every Law, and of all Laws Civil, and Temporal, is *Bonum Publicum*, and *Salus Populi*: And therefore when any Law made, is found at any time to contradict that End, every such Law must at that time be voyd in its self, or there must be a Power somewhere to suspend or dispense with such a Law, for so long time as it appears to contradict that End for which such a Law was made; for *res nolunt male Agi*: And the Common-Good and Safety of the People must and will be preferred.

Note that this is so sure a Principle, That even Magna Charta *it self, the greatest Darling of all our Laws, hath always given way to it. And therefore though our Kings have restrained themselves by that Law, generally from putting any Impositions upon Merchandises to be Imported or Exported; Yet our Judges have resolved, That for the Common-Good, the King may Controul and Suspend this Law, as in Case of an Imposition put in foraign Parts upon our Merchandises to the prejudice of our Trade, the King to enforce an abatement there, and to make an Equality for the Advancement of our Trade, may put Impositions upon their Merchandises here. So also, Though by* Magna Charta *it be generally free for every Person, with any Comodity, not expresly prohibited by some particular Law, to go out of* England *in Order to Trade, yet the King may in the time of War, restrain all Merchants from going out of* England, *or in the time of Dearth, from Exporting such Comodities (otherwise not prohibited) of which there is a Dearth in* England. *Coke lib.* 12. *fol.* 33. 34.

During vacancy of parliam^t. the publick good requires a suspension of a law, the government cant want any person of power to suspend because no gover^t can want ye power to preserve it self.

+

Dearth plague

VI. That *Necessitas est Lex temporis*, Necessity is it self a Law, whenever it happens, and for the time that it continues, it is Absolute and above all Laws. This Law commands that Authority, which hath the Right of Dispensing with Laws, to exercise that Right, And if That Authority will not do it, This Law called *Necessity* will it self exercise that Right. *Coke lib.* 12. *fol.* 34.

Note

Note when Neceſſity requires, not only the King, but every Subject may come upon my Land and make Trenches, and Bulworks there, for defence againſt an Enemy, or pull down the whole Suburbs, or any part of a City for the ſame end, or pull down or blow up any Houſe or Houſes in a Town, to ſecure the reſt from Fire: Notwithſtanding all the Laws made for the preſerving of Property. Coke *lib.* 12. *fol.* 13.

VII. That it is impoſſible for any Law-makers, who are mere Men and no more, & who have no Pretence to a perpetual Divine Aſſiſtance in the making of Laws, to fore-ſee all particular Miſchiefs aud Inconveniencies, which may happen in particular Circumſtances, by or from the making of any Particular Law. *Coke lib.* 11. *fol.* 88.

VIII. That for the Reaſons before-mention'd, of the Impoſſibility in Law-makers of fore-ſeeing all Accidents, and Emergencies, and for complying with Neceſſity, and providing for Publick-Good in all Occaſions, and the taking Care of the Safety of the People, there muſt be ſome Power always in being, to Suſpend, or Diſpenſe with ſuch Law, or Laws, as Publick-Good, the Safety of the People, or emergent Neceſſity require, at any particular Time, or in any particular Circumſtances, to be Suſpended or Diſpenſed with.

IX. That the Power of Diſpenſing with *Malum Prohibitum*, is of Right, and by our Law, in our Lord the King. *Coke. lib.* 11. *fol.* 88. For when a Penal Statute is made for the Publick-Good, the King (as the Head of the Publick-Good, and the Fountain of Juſtice and Mercy) is by the whole Realm intruſted, and particularly as to the Power of Diſpenſing with it. *Coke lib.* 7. *fol.* 36.

X. That this Truſt, and this Power of Diſpenſing with Penal Laws, are inſeparably united unto the Royal Perſon of the King, That he cannot transfer, give away, or ſeparate the ſame from himſelf; conſequently it is inherent in his Royal Perſon, that is, in his Crown. *Coke lib.* 7. *fol.* 36. Reported as the Reſolution of all the Judges of *England*.

XI. The King cannot by his Grant, nor yet by Act of Parliament, Bar himſelf of any thing which is inherent in, and inſeperably annexed unto his Royal Perſon, for that in ſo doing he ſhould ceaſe to be King, and conſequently Change and Subvert the Government, which our Law allows not.

Note this is proved in substance by 2 H. 7. fol. 6. *Cited and Agreed in* Calvin's *Case*, Coke lib. 7. fol. 14. *The Case was thus: In the Statute* 23. H. 6. Cap. 8. *it was Enacted under great penalty, That none should serve the King as Sheriff of any one County above one Year, And that if the King, by any* Non obstante, *should dispense with that Statute, such dispensation should be void. Yet it was Adjudged, That notwithstanding that expres Clause, and even against it, the King might dispense: And the reason given was, Because the King had a Right, by the Law of Nature, as King, to the Service of his Subjects. And such Right, being inseperably annexed to, and inherent in his Royal Person, that Act could not Bar the King of the Service of his Subjects; Every Subject being bound by his Natural Legeance to serve the King.*

XII. That (therefore) when ever the King, to gratifie a Parliament, doth Consent in Parliament to any Law, by which he seems to strip himself of, or depart from, any Prerogative or Right, which in truth is inseparable from him as King; Or when the King in Parliament, or otherwise by any Declaratory Words or Speeches, seems to relinquish such Right; such Consent to such Law, is no more than an Agreement on his part, not to use that Right ordinarily; but only in Extraordinary Occasions, when in his Princely Wisdom he shall find it necessary, and for Publick Good. But this Bars him not to use this Right again, when he sees just cause so to do, nor can any declaratory words spoken by the King, or his Assent incerted into an Act of Parliament, Estoppe the King in any Case of this Nature.

This Ground being established, all the difficulties touching Parliaments endeavouring to entrench upon the Crown, and the frequent Charges of Breach of Promises imputed to our Kings, are solved and fall to nothing, nor will there be any more use of that Engine, made use of so unhappily by the late Usurpers, of wounding the King, through the pretence of removing Evil Counsellors, when ever the King shall think fit to reassume his Right in Extraordinary emergent Occasions, after having agreed by Act of Parliament, or by any other publick way, not to make use of that Right ordinarily. It being clear upon this Ground, That a *Parliament*, offering a Bill to the

King, which ſeems to take from him ſuch a Right, hath not in *Truth any Deſign* in it to prejudice the Crown. For then a *Parliament* ſhould do wrong, which the Law allows not to ſay, nor is ſuch a reaſſuming the Exerciſe of ſuch a Right, a Breach of Promiſe in the King; but a making uſe of the Condition implyed in his Agreement, as to ſuch a particular Caſe, and in ſuch preſent Circumſtances: Otherwiſe the King ſhould be ſaid to do wrong, which our Law alſo forbids us to ſay. And all thoſe Judgements and Reſolutions of our Judges, which confirm it to us, That the King hath ſuch Rights, and which have allowed the Exerciſe of ſuch Rights (notwithſtanding Acts of Parliament) would be infringed, and become Etronious, and conſequently the whole Frame of our Laws unſettled.

Theſe Rules before layd, or ſome other of the like nature, which thoſe who are learned in our Laws agree upon among themſelves, have been of ſo great force, that in all Ages, thoſe who have been otherwiſe the greateſt Oppoſers of the Prerogatives of the Crown, have nevertheleſs always Agreed, That the King hath a Power inherent in him, and inſeperable from his Royal Perſon, to diſpenſe with Penal Laws, as to particular Perſons. But ſeveral do deny, That His Majeſty hath any Power in himſelf alone, to diſpenſe in general, with a Penal Law; or to ſuſpend in general the Execution of ſuch a Law: Though others do very ſtrongly Affirm His Majeſty to have this Power, and do conceive, that upon the Grounds before laid, all Objections which are commonly urged againſt this Power, are clearly Anſwer'd and prevented.

Thoſe who maintain the Affirmative in this Point, do at all times declare, That their Affirmative is not intended of a General Power, in the King, to ſuſpend all Penal Laws in general, at his pleaſure, to the prejudice of the Publick, and without juſt Cauſe; Such a Power being againſt the Grounds before laid, and never claimed by any King of *England*. But that which they affirm is of a Right bounded within the true, juſt, and agreed Definition of a Diſpenſation, mention'd as the fourth Ground before aſſerted. And therefore when they diſcourſe the point, they ſtate and divide the Difficulty into theſe following Queſtions. (*viz.*)

Queſt. I. *Whether the Legiſlative Power may not poſſibly make ſuch a Law, as in reſpect of Time, and other Circumſtances, impoſ-*

ſible

ſible to be foreſeen, may prove inconvenient to the whole Kingdom, or a great part of it? And if the Affirmative in this Queſtion be True, which they hold, Then

Queſt. II. *Whether in caſe of ſuch a Law made, is there not ſome Power, and is it not abſolutely neceſſary there ſhould be ſome Power, always Viſible, and in Being, to diſpence with, and to ſuſpend the General Execution of ſuch a Law, Neceſſity and Publick, or General Good requiring it?* In this they alſo hold the Affirmative, which if it be True, Then

Queſt. III. *Whether this Power be in the King, or any where elſe, And where elſe? Or whether it be in the King, with ſome other, And with whom?* And in this they hold That it is in the King ſolely.

For Proof of their Affirmative to the firſt Queſtion, they ſay

I. It is proved by the Seventh Ground before layd. II. By what is obſerved upon the Fifth Ground, even *Magna Charta* rigorouſly inſiſted on, according to the Letter of it, would be inconvenient, and againſt Publick Good. III. There are many Ancient Penal Laws, which though never Repealed, yet are not put in Execution. Becauſe though Neceſſary when they were firſt made, yet now Obſolete in reſpect of Time, and other Circumſtances, not foreſeen, and impoſſible to be foreſeen, when the ſaid Laws were made. IV. It is ordinary for the Legiſlative Power in all Ages, to make ſeveral *P*enal Laws meerly temporary, and experimentally, to the end that Experience may ſhew whether they may conveniently be continued or not. V. The late Acts of Parliaments made, for Encouragement of Navigation, and touching Cart-wheels, being *P*enal Laws, made by this preſent *P*arliament, does clearly prove this point. The firſt had Inconveniencies not foreſeen, and only appearing when we made War; The other had ſuch Inconveniencies not foreſeen by the Law-makers; that had it been put in Execution, all our Inland Trade had been deſtroyed.

For Proof of their Affirmative to the Second Queſtion, they ſay

I. It is proved by the Fifth, Sixth, and Eighth Grounds before layd. II. To deny this, would be to Charge our Laws with

with the higheſt defect imaginable, for to grant (as they do) That the Law hath provided a Fountain of Mercy always viſible and in being, to take care of private and particular Perſons, and to diſpenſe with Penal Laws, as to ſuch, when Neceſſity requires, and to deny that the Law hath provided any Fountain of Mercy always viſible, and in Being, to take Care of the Publick, and to provide for the Safety of the People when Neceſſity requires, would be to charge our Law with a greater defect than ever any yet charged it with. III. That if no ſuch Power had been, all Navigation as to Trade, muſt have totally, or at leaſt for a great part have ceaſed during this preſent War for want of Mariners, and all our Inland-Trade muſt have ceaſed from the time of the making of the Act touching Cart-Wheels for want of Carriages; and *De Witts* deſigns (for ought we know) might have been effectual to have engaged us in a New War at home, and to have Provoked our Non Conformiſts into a Rebellion (in which they would moſt certainly have been aſſiſted with all neceſſaries from *Holland*) for the reſcuing themſelves from the Inconveniencies which they pretend they lye under, from the Penal Laws made againſt them, if there had not been a Viſible Power in Being, to avoid the Danger then threatning us (and not foreſeen by the Law-makers) by ſuſpending the Execution of thoſe Laws.

For Proof of their Affirmative to the Third Queſtion, and what they hold therein, they ſay

I. It is proved by the Ninth, Tenth, and Eleventh Grounds before layd. II. There is no other Power always viſible, and in being, which doth or can pretend with any colour of Reaſon, to have this Right, beſides the King alone. III. To place this Power in any other, without the King, would be to make that other, King. And to place it any where, then in the King alone, ſo as to make ſome others to be ſharers in this Power, were to make thoſe others, to be ſharers in the Higheſt Act of Soveraignty, and conſequently ſharers in the Crown; which would be wholly to change our Government, and to alter our Laws, and conſequently to ſubvert all our *Liberties* and *Properties*, which cannot be ſafe, if any *Principles* be admitted in alteration of our *Laws*, and Government. And it is for this

Reaſon, that the King cannot commit the power of his Mercy, concerning any *Penal* Statute to his Subjects, *Coke lib. 7. fol. 37.* IV. Our Kings have always uſed this *Power*, and our Judges approved the Exerciſe thereof to be agreeable with our *Laws*, as is proved in the Grounds before layd. And though it be true, that ſome Ancient *Laws* ſeem ſuſpended by a diſ-uſance, and a ſeeming tacite Conſent of the whole Kingdom, King, Judges, and *People*, yet that was in truth the ſuſpenſion of the King alone. For thoſe *Laws* were (when once made) the King's *Laws*, and the King was the only *Perſon* truſted with them, he might have put them in Execution, and commanded his Judges to ſee them put in Execution, if he had pleaſed, and his Judges would not have taken upon them to ſay, That they the Judges, or, That the *People*, had thought fit to ſuſpend them by common conſent, and therefore they, ſtood Suſpended.

In ſhort, thoſe who do maintain theſe Affirmatives, in all theſe Queſtions, and inſiſt upon the Grounds, and Rules before layd, do, for farther clearing of the matters in debate, humbly offer the following Caſes to Conſideration, as concieving the Solutions of them may ſettle the *Point*.

I. Suppoſe a Diſtreſs taken upon that Branch of the Statute of 14. *Car.* 2. *cap.* 6. which relates to the breadth of the Weels of Carts, and Waggons, and the Execution of which Branch was ſuſpended by His Majeſties *Proclamation*, Would the Judges juſtifie this Diſtreſs or not? If they did, in purſuance of the Statute, and diſ-allowance of the *Power* of Suſpenſion, the Conſequences would be, That they would hereby deſtroy the greateſt part of *In-Land-Trade* of the Kingdom. If they did not allow the Diſtreſs; but agree the Act to be lawfully Suſpended by the King's Proclamation, iſſued forth in a Caſe where ſo great a Neceſſity required, for the *Publick Good*: Then all the three Affirmatives upon the aforeſaid Queſtions are ſettled, with this Addition; That the King may diſpenſe with a *Malum Prohibitum*, though it be (as it is in the Caſe put) adjudged by Act of Parliament a *Common Nuſance*; And may diſpenſe with a *Penal Law*, though the Forfeitures (as they are in the Caſe put) be not given to the King, but to others, as in this Caſe, to the Surveyors

of

of the High-Ways, the Poor, and the Profecutor. But if the Judges in this Caſe, as it is here put, to avoid the difficulty, ſhould refuſe to allow the diſtreſs upon ſome other Reaſon, as rather taking upon themſelves to adjudge the Act of *Parliament*, as to this particular Branch, to be void, then to allow the King to have *Power* to Diſpenſe with what an Act of *Parliament* adjudgeth to be a Common Nuſance; though the whole Kingdom believes that his Majeſties ſaid Proclamation, was the ſole Cauſe, why there was never any Execution of that Law: And that no man was ever proſecuted upon that Branch, becauſe all men generally admitted that the King had diſpenſed with it, and had a power ſo to do; And conſequently, That the Judges never had an Opportunity to Repeal it, by their Judgment: yet if the Judges ſhould in this Caſe proceed this latter way, or any other way, rather then to Affirm the King's Right (for Reaſons beſt known to themſelves) there would be then no more gained by this Caſe, then, A Law may be made by the Legiſlative Power, which may be very inconvenient to the whole Kingdom, And that in ſuch Caſe, there muſt neceſſarily be a Power ſomewhere, either to ſuſpend its Execution, or to Repeal it totally by adjudging it to be Void.

And then the next Caſe proceeds thus:

II. Suppoſe a Law made under the penalty of 100 *l.* to the Proſecutor to his own Uſe, That none ſhall ſerve His Majeſty, either in his Navies at Sea, or in his Armies at Land, or bear Arms in the Militia in any County, except he firſt take the Oaths of *Supremacy*, and *Obedience*; And take the Sacrament of the *Lord's Supper* according to the Form uſed in the *Church of England*: And *Abjure Tranſubſtantiation*. This Law being made; Suppoſe *France* and *Holland* ſhould Unite their Forces, and make a preſent War upou His Majeſty: And (the more to diſtract us and raiſe Diviſions amongſt us) ſhould publiſh their *Placaet*, and promiſe a general Toleration, to all in *England*, in point of *Religion*, and the Enjoyment of their Ancient Laws; if the People of *England* will ſit ſtill and not

take up Arms; many in *England* who are willing to Assist the King in this Exigency, dare not bear Arms because they cannot comply with what the aforesaid Law requires. Many who can comply with this Law, refuse to comply, and consequently pretend they cannot comply, and therefore that they dare not bear Arms. But their true Reason is, That they know they can have no Toleration in the business of *Religion*, secured unto them by the King; And they hope the Enemy, if they overcome, will for their own Interest (at least) make good their Promise. The rest of the Nation are not able to Defend the Kingdom. Now it is demanded of the Judges: *May the King in this Exigency, Dispense with this Law, and suspend all the Penal Laws in cases of Religion: And hath the King a Right to do this?* If he cannot, Then clearly the Crown and Kingdom must be Lost, because our Law is in so great a Point defective. If the King hath Right to do this, tho' no part of the Penalty be by this Law to the King, but all to the Informer; Then, put the same Case yet farther, And suppose the *Malum Prohibitum* in this Law, were by this Law adjudged and declared to be a common Nusance: Nay suppose it were adjudged to be Felony or High Treason. *Hath the King in such Case, a Right to Dispense, and is not the King the sole Judge in this Case of the Necessity, and of the Publick Good? Or is the King to Call a Parliament of necessity to judge in the Point, and so hazard the Ruin of the whole in expecting the meeting of a Parliament? Or must he Consult the Judges, and be bound by their Opinions in so great an Affair of State, Necessity, and the Publick-Safety?* It is conceived the Resolution of this Case will put an end to the whole Doubt.

Against these Affirmatives, several Objections are usually made, which are Answer'd thus:

Object. I. *That the King by his Coronation Oath, and by several Promises, hath pleased to bind himself to maintain all the Laws. And since all men agree, That Almighty God can bind himself by his Promises, it is unreasonable to say the King cannot bind himself.*

Answ. I.

Anſw. I. This Objection if it proves any thing, proves too much, for it is as ſtrong to take away the King's Power of Pardoning, or of Diſpenſing with a Penal Law, as to a particular perſon, as to take away his Power of Diſpenſing in general. But the Objectors Grant, That the King hath the former Power inherent in him, notwithſtanding theſe Promiſes, and Oath, and that no Conſtruction ſhall be made of them, to bar him from Pardoning, or from Diſpenſing with particular Perſons; therefore no Conſtruction ſhall be made of them to Bar him from Diſpenſing generally. *Secondly*, There is no Conſtruction to be made of any Promiſe of God, to bind his Divine Majeſty to ceaſe to be Good and Merciful; Becauſe thoſe Attributes are of his Eſſence, and ſuch a Promiſe, would amount to a Promiſe to ceaſe to be God, which God cannot ceaſe to be, and therefore cannot be intended to bind himſelf to ceaſe to be. So neither ſhall any Conſtruction be made of any Oath, or Promiſe of the King, to bind the King to ceaſe to have the Power of Mercy, becauſe it is of the Eſſence of the King: And it would amount to a binding himſelf to ceaſe to be King, which he cannot bind himſelf to ceaſe to be. *Thirdly*, This Right of Diſpenſation is a Law in its ſelf, and ſo neceſſary and fundamental a Law, in order to the *Publick Good*, That without it, and without the Exerciſe of it, when the *Common Good* requires it to be Exerciſed; The Kingdom cannot be, and the King's Prerogative is Law. Therefore the King's Oath and Promiſes to maintain the Laws, bind him to maintain and exerciſe this Right. And to put ſuch a Conſtruction upon the ſaid Oath and Promiſes, as ſhould bind the King not to uſe this Right, were to bind the King to Break and to Violate the Laws, and to neglect the Safety of the Kingdom. Nay, for the King not to exerciſe this Right, would be to Violate his Oath and Promiſes, and to break the Truſt repoſed in him, by the whole Realm, when they make a Law and entruſt him with it, as the Fountain of Mercy, and Head of the *Publick Good*: And to fruſtrate the Chief End of all our Laws. *Fourthly*, The Objection is therefore grounded upon a miſtake of the Queſtion; For no man will or dares ſay, That the King is bound to enforce the Execution of a Penal Law, to the prejudice of the whole Kingdom, or of a very notable conſiderable part of it.

Object. II. *That all the Judges, and all who are in the Commiſſion of the Peace, are Sworn to put the Laws in Execution; But if the King ſhall be ſaid to have this Power, he ſhall have it in his Power to make all theſe Perjur'd.*

Anſw. I. This Objection, as the former, makes as much againſt the King's Power of Diſpenſing as to particular perſons, as againſt the Power now affirmed, and ſo it fights againſt the Objectors allowed Opinion, and proves nothing. *Secondly*, The Right, and Prerogative in diſpute is a *Law*, ſo they are bound by their Oaths to ſubmit to it, and maintain it. *Thirdly*, A Diſpenſation in our Caſe is in the nature of a Temporary Repeal of a *Law*, for it is a laying it to Sleep for a time, in a *Legal* way; conſequently there is no more Obligation from the Oath objected, to put a *Law* in Execution, during the Time that the Execution thereof is by a Diſpenſation *Legally* Suſpended, then there is to put a *Law* in Execution after it is Repealed. And to do either, would be againſt the Oath objected, becauſe it would be to Act againſt *Law*. And if this be denyed, it were worthy Enquiry, Why the Judges, who are bound by Oath, as is objected; and who ſometimes affirm themſelves obliged by Oath, to give the *Laws* in Charge in their Circuits: do nevertheleſs forbear to give in Charge, or put in Execution, ſeveral Obſolete and Antiquated *Laws*, which have never been actually Repealed by the *Legiſlative* Power; but only Suſpended by the Act, or by Allowance of our Kings (who might have enforced the Execution of them if they had pleaſed) and by the Conſent, and tacite Agreement of our Judges, and whole Kingdom, taken to be ſuſpended.

Object. III. *If this Power be allowed to be in the King, he may by Virtue of it Suſpend all our Laws, and even* Magna Charta *it ſelf, and then farewell all our Liberties and Properties.*

Anſw. If this Objection be not grounded upon a Miſtake of the Queſtion, it ſignifies nothing, the Right aſſerted is a Righr of Diſpenſation, *Publick Neceſſity*, and *Publick Good* requiring it. It is proved by the *Fifth Ground* before laid, and the Inſtances urged, to prove that *Ground*, That *Magna Charta* hath been, and may be Suſpended by this Right, when *Publick Good* re-

requires ſuch Suſpenſion. And what matter is it, how many Laws are Suſpended at one time, for *Publick-Good*, which is the End of all our Laws? Here is no other Right pretended to be maintained in the preſent Diſpute; But what is for *Publick-Good*, and the Conſervation of our *Liberties* and *Properties*.

Object. IV. *The Allowance of this Power to the King, may be Dangerous in its Conſequence. For in Effect it makes him ſole Judge in the Caſe. And then he may uſe this Power by miſtake, to the prejudice of the Publick.*

Anſw. If there be any Danger in making the King Judge in this Caſe, And that this Danger be an Error, it is not the fault of thoſe who maintain this Right: But of the Law which declares this Right to be in the King, and of the whole Realm which entruſts the Power of Mercy in the King. The ſame Law, and the ſame Realm entruſts the King with the Sword of Juſtice, with the Militia, and with the Power of Peace and War; yet the Law was never blamed in theſe points; nor ought the Kingdom to be charged with Folly, or Imprudence, for theſe Truſts. Certain it is, theſe Powers, and theſe Truſts muſt of neceſſity be in ſome Perſon or Perſons, alwaies Viſible, and alwaies in Being. If it be in *One Single Perſon*, he is & muſt be King; If in more, then we muſt change our Government and Laws: And how ſafe that will be for our *Liberties* and *Properties*, is not hard to judge. The ſame Law that Entruſts theſe Powers in the King, knowing him to be a Man, Entruſts the Legiſlative Power in the Parliament, which is compoſed of Men, and the whole Realm Conſents to theſe Truſts. This is the Conſtitution of our Government. And as our Law Affirms, that this Truſt as to the Legiſlative Power, will not be abuſed, and therefore ſays poſſitively, That in the Exerciſe of the Legiſlative Power, the Parliament can do no wrong. The Law implying the Conſent of the whole Realm to be included in what they do? and conſequently, That none ſhall be ſaid to be wronged in what they Conſent to. So the Law, and the whole Realm, conſenting to Repoſe theſe Truſts in the King, the Law affirms, and the whole Realm believes, That theſe Truſts will not be abuſed; and therefore the Law ſays, That in the Exerciſe of theſe Truſts, the King can do no wrong: The Law implying,

the Conſent of the whole Realm to be included in the repoſing of theſe Truſts in the King, and conſequently to be included in what the King does in the Exerciſe and Execution of theſe Truſts; and conſequently, that none ſhall be ſaid to be wrong'd in what they Conſent unto. And in Truth our Law ſays, the King makes the Laws, and is the ſole Judge even in Parliament, and the Lords and Commons only Aſſent. And the King is ſolely intruſted with the Power of Judging, and that he hath no Judge over him. 22. *Ed.* 3. *fol.* 3.

Object. V. *If this Right may be allowed, the King may Licence a Common Nuſance, or Felony, or High-Treaſon.*

Anſw. The Queſtion is only touching the Licenſing of a thing which in its own nature is indifferent, and if not prohibited by a Law, might be honeſtly done, and becomes an Offence only by being prohibited, and becauſe it is prohibited by a Law made for *Common-Good.* And this being the true ſtate of the Caſe, the Objection is fully granted. The King may Licenſe the doing of a thing, *Common-Good*, and *Publick Advantage* or *Neceſſity*, requiring the Licenſing of the ſame, (regard being had, to particular circumſtances of Time, and other Reaſons of State and concernments) which by Law, was made an Offence, or *Common-Nuſance*, or *Felony*, or *High-Treaſon.* And this is ſo far from being a prejudice or miſchief, That it would be an Inconveniency not to have ſuch a Power ſome where. This is proved by the *Fifth* and *Sixth* Grounds before layd. And for farther proof, there is one inſtance amongſt many, in the Books. 11. *H.* 7. *fol.* 11. *Bro. tit. licences.* 24. Where it is Reſolved, *That whereas the Coyning of Money was an indifferent thing in it ſelf, And might have been practiſed by every man, that pleaſed, untill it was made an Offence by Law* : (which makes it High-Treaſon) The King may Diſpenſe with that Law, and licence the Coyning of Money. This is an Inſtance of the higheſt nature, (*viz.*) of a *Malum Prohibitum* made Treaſon. And therefore other Inſtances are needleſs.

Object.

Object. 6. *If this Right be allowed, where the Penalty for doing a* Malum Prohibitum *is given to the Poor, or the Profecutor, and not to the King, the King ſhall have power to Deprive the Subject of what the Law gives him, which will be a Wrong; and the King can do no Wrong.*

Anſw. This Objection, as the former, is grounded upon a miſtake of the Queſtion, which is only of Diſpenſing *Pro Bono Publico*, in Caſes of *Common-Good*, and *Publick Advantage*, or *Neceſſity*, ſo that what at the time of making the Law, which made it an Offence, was fit for the *Common-Good* to be prohibited, and made an Offence, comes at the Time, and in the Circumſtances wherein it is Diſpenſed with, to be a *Common-Good*; and conſequently neceſſary to be licenſed. So that admitting it were a miſchief to the Proſecutor, or to the Poor of ſome Pariſh, to be barred of the Penalty given by the Law; yet to the Publick it would be an Inconveniency, not to have that Licenſed, which *Common-Good* requires to have Licenſed. And the known Rule of Law requires, *That a private Miſchief ſhould rather be ſuffer'd, then a Common Inconvenience*: Conſequently by this Right exerciſed, the King does no Wrong. For to prefer *Publick-Benefit*, before the private Gain of Informers, who are the Peſt of the Kingdom, or before the Poor of a Pariſh, who muſt otherwiſe be kept by the Pariſh, is no Wrong. Beſides the Objectors grant, That the King, notwithſtanding this Objection, may licence particular perſons, And they muſt grant, That before an Action commenced, the King, after an Offence committed, may deprive an Informer, of what the Law gives, by a particular Pardon. Both theſe Rules are lay'd in the Books of 2. *R.* 3. *fol.* 11. 12. & 1. *H.* 7. *fol.* 3. & 37. *H.* 6. *fol.* 4. & 5. And if it be no wrong to Pardon the Offence committed, altho' there be no Pretence of *Common-Good*, upon which the Pardon is grounded, it is certainly no wrong to Diſpence for *Common-Good*.

Object. VII. *That there are no expreſs Judgments found in our Law-Books to warrant this Right in the King: And it is to be preſumed, That it being a Right often Claimed by our Kings, and Denyed by the Subjects, The Judges, who by their Offices are the King's Council Learned, would not have left ſo material a Point unſettled.*

Anſw. I. Suppoſing this Objection were true, That there were no Expreſs Judgments found in this Caſe, yet the Conſequence doth no more follow, That therefore the King hath no ſuch Right; then the contrary conſequence would follow, Therefore the King hath ſuch Right. For though it be true, That the Judges in all Ages were, and are the King's Council Learned, And the Kings of *England* have always Claimed and Exerciſed this Right, undoubtedly they would not have done this, if their Judges had plainly told them, That it was againſt Law; or that the thing had not been clear, in its own nature. And if there were no Judgments in the Caſe mention'd in our Law-Books, when the thing hath been ſo conſtantly practiſed, it rather ſeems clear, That it was ſo undoubtedly the King's Right, That no Perſon in any Age ever thought it a Point fit to conteſt upon, or to put it to the Judgment of a Court. There is no diſpute but that there have been many Parliaments in former times, who have attempted to tear many *P*rerogatives from the Crown, taking advantage of the Wants or Weakneſs of our Kings: And it is as certain, that the Generality of our Judges in all Ages, have more enclined to leſſen the King's Prerogative, then to deprive the People of their Liberties; either as thinking their own Intereſt concerned therein, as Subjects, or as inclining rather to an *Ariſtocracy*, then to a *Monarchy*; or rather (and which is the moſt probable) upon the account of fear of being queſtion'd by Parliaments, knowing well, that whenever they did pinch hard upon the Prerogative Royal, the Kings were generally Merciful in their own natures, or might be prevailed upon by their Courtiers, to pardon and paſs by it, and that it was never to be diſpaired but that a way might be found to pacifie the diſpleaſure of the *P*rince, who was but one Man, and who had no way to puniſh, but only by diſplacing, which was ſeldome done for an Error of a Man's Judgment.

But

But that whenever they happened to fall under the displeasure of a Parliament, upon any jealousie of advancing the King's Prerogative too high; the Excuses of Human Frailty, and of Erring, though a real and involuntary mistake, did as seldome procure their Pardon, as a like pretence would preserve a Person from the punishment of the Law, who should stand Indicted *before themselves*. For Courts are not single persons, nor is it reasonable they should be, their Constitutions being to take care that Justice should be Executed *In Terrorem*, without Favour, or Affection; knowing that Mercy floweth by the Constitution of our Laws, from another Fountain. This is said, supposing the Objection were True. But, *Secondly*, The Objection is before proved to be most untrue by the instances put of the Judgments given, touching the Dispensing with *Magna Charta*. *Coke*, *lib.* 12. *fol.* 33. 34. The Judgment given in 2 *H.* 7. *fol.* 6. agreed in *Calvin's* Case. *Coke*, *lib.* 7. *fol.* 14. and the Case of Licensing Coyning. 11. *H.* 7. *fol.* 11.

Object. VIII. *That several Privy Counsellors and Great Men in former Times, and particularly Cardinal* Wolsey, *and the late Earl of* Bristol, *have been impeached by the Concurrence of our most Learned Judges, for Advising the Kings of this Realm to Dispense with Penal Laws.*

Answ. I. It is no Dishonour to Parliaments, to say, that all Impeachments even by Parliaments, are not always just, and well-grounded, though judged to be so at the time when they are framed; an instance may be given in the deplorable Case of the Late Noble Earl of *Strafford*, Impeached and Attainted unhappily by a Parliament, and that Attainder most happily and justly Repeal'd by this present Parliament. Therefore if it could be proved, That any Minister of State had at any time been impeached by a Parliament, for Advising any of our Kings to Exercise the Right now asserted, it would no way prove, That our Kings had no such Right by our Laws. *Secondly*, But there can be no President shown, of any Impeachment against any one Person in any Age, by any Parliament, or any other Just and Legal Authority, for Advising any of our Kings to Dispense with any one or more of our Penal Laws for the Publick Good, or in any Case where Publick Advantage or Necessity required such Dispensation. *Thirdly*, As to the Cases urged in the

Objection, they are not to the Point in Queſtion; The firſt of Cardinal *Wolſey* was as to Licenſes, That he granted Licenſes under the Great Seal (being Chancellor) for Exporting Goods prohibited by Law, for Advantage to himſelf and his Servants, without the King's Warrunt or Knowledge. *Coke, Jurisdiction of Courts, Tit. Chancery. foll.* 90. This in truth was a Grievous Crime, to grant Licenſes under the Great Seal for Diſpenſing with Penal Laws, without the King's Warrant or Knowledge; But this very Charge implyes, That this had been no Offence if he had been Authorized, by the King's Warrant to Seal ſuch Licenſes: And every Merchant knows, That nothing is more in practice, then for the King, in ſpecial Caſes, to Licenſe the Exporting of Goods, prohibited by particular Laws, to be ordinarily Exported.

The Caſe of the late Earl of *Briſtol* is as far from the Point as the former, The Caſe was thus: That Lord had been imployed by King *James* as his Majeſties Ambaſſador in *Spain*, to Treat touching the Marriage with the then *Infanta*; the King of *Spain* being Zealous for the Religion of the Church of *Rome*, inſiſted in the ſaid Treaty, to procure ſome favours for the *Engliſh Roman-Catholicks*: The firſt Propoſals, as to the matter of Religion, related no farther then to a Freedom of Religion, for the *Infanta* and her Servants, the Children of the Marriage, and her Eccleſiaſticks and Religious. This could not be without the King's particular Licenſes: This the King aſſented to (*Ruſhworth's Hiſtorical Collections. fol.* 4.) The King agreeing, thus far, and the Treaty being prolongued by many Artificial delays, The King of *Spain* urged farther, in favour of the *Engliſh Roman-Catholicks* in general: But the form, and way to be left, to his Majeſties Wiſdom and Clemency, that the Mercy mmight be Acknowledged to come from his Majeſty. To this the ſaid King *James*, and his Late Majeſty, both Signed. (*Ruſhworth fol.* 287.) And after all this, King *James* for farther Satisfaction in this matter, did by the Lord *Conway* his Majeſties Secretary of State, by a particular Declaration in writing, Signed by the ſaid Lord *Conway*, and Dated *Aug.* 7. 1623. Declare and Engage, *That his ſaid Majeſty would cauſe a preſent Suſpenſion under his Majeſties Great Seal, of all thoſe Penal Laws, Charges, and Forfeitures, whereunto the* Roman-Catholick *Subjects of his Majeſty had thentofore been ſubject; and in the ſame Grant, and under the ſame Seal, to give a Diſpenſation and Toleration*

tion to all the Roman-Catholicks, *His Majeſties Subjects, as well Prieſts, as Temporal Perſons*, &c. (*Ruſhworth, fol.* 288. 289.) The Marriage not taking effect, and Animoſities and Feuds happening between the then Duke of *Buckingham*, and the ſaid Earl of *Briſtol*: the ſaid Earl after that King's Death, in Parliament impeached, and wrought with the Houſe of Commons to Impeach the ſaid Duke. And the ſaid Duke prevailed with his then Majeſty firſt to Exhibite an Impeachment againſt the ſaid Earl in the ſame Parliament, thereby intending to make the ſaid Earl either to retract, or to forbear proſecution of his Charge againſt the ſaid Duke; or to invalidate his Teſtimony. And true it is, that the Fifth Article of the Charge againſt the ſaid Earl was, *That he Counſell'd, and perſwaded King* James *to Grant, and to allow unto the Papiſts, free Toleration, and Silencing of all the Laws made, and ſtanding in force againſt them.* The Charge is not, *That he Counſell'd the King to Grant a Publick and Free Toleration*; But to Diſpenſe with the Laws For Toleration, and Diſpenſation, import no more than a permiſſion to Exerciſe their Religion in their private Houſes, and to Suſpend the Execution of the Laws there mention'd, for a Time. All which the ſaid King had power (in purſuance of a Treaty, and Articles, between Crowns, upon the breach or performance of which, Peace or War, Common-Good, or Publick-Prejudice depend) to do. But to Counſel a free Toleration, imports an Allowance of Publick Worſhip, which as Affairs then ſtood here, could not conſiſt with Publick Peace: The Temper of this Nation not enduring it, nor could the Papiſts have been ſecured from the Rage of the People in the Enjoyment of it. And the Silencing of the Laws might import a Total Repeal of them, which the King did not Claim a Right to do of himſelf. So that this comes not to our Poynt in Queſtion: This Lord was not Impeached by Parliament, nor by any appearing Concurrence of Judges, nor for Adviſing the King to Diſpenſe with any Penal Law for *Publick-Good*, or where *Neceſſity* required. But there is yet ſomething more in this Caſe of the Earl of *Briſtol*. The whole Story is told at large by Mr. *Ruſhworth* in the Book before cited: And it had this farther in it, (*viz.*) *That when the Impeachment was brought into the Lords Houſe, the Earl of* Briſtol *put in his Anſwer to it: and as to this particular Article, he firſt denyed poſitively, That he had Counſell'd any thing in the matter charged. And then he declared fully what was done, and ſet forth at large the matters*

of Fact before-mention'd, as well as to what was Signed by King James, *and his Late Majesty King* Charles *the First, as also the Declaration Signed by the Lord* Conway *by King* James *his Order.* So that in this Case there are these things worthy observation to the present purpose. *First*, That it is not probable but that the said Duke of *Buckingham*, being the then Greatest Minister of State and Favourit to King *James*, did Advise in all things which then passed in that Affair, and particularly in the Declaration Signed by the Lord *Conway*: But touching the Lord *Conway*'s Signing a Declaration, there can be no question. *Secondly*, That the said Earl wanted neither Wit, Will, nor Courage to Charge the said Duke, as far, and with Crimes as distastful as he could find any, wherewith to Charge. And that he was not fond of, nor any ways obliged to spare the Person of the Lord *Conway*, who was the Duke's Friend, and must have been the Duke's most material Wittness, to save him in Case the Charge against the Duke had been prosecuted. *Thirdly*, That the Parliament then sitting, was as diligent in Enquiring into *Misdemeanors*, as much displeased with the Duke of *Buckingham*, as little tender of the Lord *Conway*, as Secretary of State; and much inclined to Enquire in relation to the too much Advancing and Stretching the King's Prerogative to the prejudice of the Subject, and against the known Laws; as (peradventure) any Parliament that ever Sett in *England*: yet neither did Parliament, nor this Earl of *Bristol*, Charge any thing against this Duke, or Exhibite any Impeachment against the said Lord *Conway*, for Advising to Dispense with Penal Laws; nor did this Parliament any way appear to prosecute the said Earl of *Bristol* upon this Impeachment Exhibited against him, though he was thereby particularly Charged for thus Advising.

This seems a very probable Argument (at least) to prove that both the Earl of *Bristol*, and this Parliament, did Believe the King to have this Right which is here Asserted.

Object.

Object. IX. *That King* James *when he Treated in Relation to the Match with* Spain, *being demanded to Suspend the Execution of the Penal Laws, then in force against the* Papists; *was pleased to Answer: That it was not in his Power so to do, without a Parliament.*

Answ. This whole Objection is most certainly a mistake, For it is evidently proved before, what Opinion King *James* had, and how well he was satisfied with, and understood his Right in the point of Dispensations: And how Wise and Knowing a Prince he was, all Man-kind is satisfied. Therefore if any thing were demanded of that King, in that Treaty, to which his Majesty gave any such Answer, as is here Objected; The demand did certainly Extend so far, as to require a Total Silencing, and Repealing of those Laws. In which Case his Majesties Answer was most certainly True. But to suppose that King to have given this Answer, where the Question or Demand was only touching a Suspension of Laws, and then afterwards, to have offer'd, and promised a Suspension of the same Laws under his Great Seal, would be with the highest Folly, Self-contradiction, and want of Sincerity imaginable.

Object. X. *That his now Majesty, in a Speech heretofore made by him in this present Parliament, did by implication agree that he had not, by wishing that he had, such Power, as is now insisted on. And when afterwards his Majesty by Advice, took upon him to Exercise this Power, he did again upon further Advice wave the same.*

Answ. I. This as well as the other Objections in the Case of King *James*, if they were granted as far as the Objections can be put, Nay if the Cases were, That King *James* had, and his now Majesty also, past Acts of Parliament, expres in the point to bar themselves and the Crown of this Right, the same must be only intended, as to the ordinary Exercise of that Right; But not of the Extraordinary Exercise thereof, when the Publick Good requires the same should be Exercised, which is proved by the Grounds before layd. *Secondly*, And that his

Majeſties proceedings are to be thus intended, and not otherwiſe, is proved by the continual Exerciſe of that Power in the Caſes of Suſpenſions of Penal Laws, ſuſpended by the King's ſole Power, and the Suſpenſions never Queſtion'd, never Complain'd of, but ſtill ſubmitted unto, and admitted as Legal; namely, thoſe touching *Navigation*, touching *Importation of French-Wines*, and touching *The Breadth of Cart-Wheels*. If the King had been really perſwaded, into a real Belief by the miſtaken Advice of the Earl of *Clarendon* (whoſe Opinion in *Law* was never eſteemed of Venerable Authority) at the time of his Speaking, which is Objected. It is clear by his Majeſties Practice ſince, that he hath found cauſe to alter that Belief; And if his Majeſty for Reaſons beſt known to his Royal Self, hath in one particular Caſe, waved the Exerciſe of his ſaid Power, yet his continual Exerciſe of the ſame Right in the other laſt mention'd Caſes, makes it evident, that it is only a wavior in this ſingle Caſe in particular Circumſtances, and upon ſuch Advice, as that he ſtill nevertheleſs thinks it moſt reaſonable and legal to continue the Diſpenſations, by which his Majeſty hath Suſpended thoſe other Laws. And it were Injurious to the Care and Wiſdome of his Majeſties Great Counſel, and to the providence and foreſight of his Counſel Learned the Judges, to conceive, that they do not take the Execution of thoſe other *Laws* to ſtand well Suſpended by his Majeſties reſpective *Proclamations*, by which they ſtand Suſpended, whilſt yet they have not complained, of thoſe Suſpenſions; nor prepared or adviſed the preparing of any Bills to be offered to his Majeſty for the Repealing or Suſpending of thoſe Laws by Act of Parliament.

Object. XI. *That all our preſent Judges, have expreſly declared their unanimous Opinion in the very point, by giving in Charge the Laws intended to be Suſpended by his Majeſties late Declaration (which hath been the Occaſion of the Publick Debates touching this matter) albeit the ſaid Declaration did expreſly affirm the ſaid Suſpenſion to be for Publick-Good.*

Anſw. The Proceedings of our Reverend Judges are always Regulated by prudent, but ſtrict Rules, and thoſe Rules relate as well to matter of Form, as to matter of Subſtance. This

our

our Law requires, and by their Oaths they are bound up to proceed according to Law: which is the true reaſon why many Judgments given in our ſeveral Courts are afterwards reverſed, in Caſes otherwiſe very honeſt and juſt: Learned Men have been often heard to wiſh, that Matters of Form might be leſs Conſiderable in our Laws; And that our Judges of every Court of Law had alſo a Power to Conſider and Judge alſo of Equity in all Caſes coming before them. It ſeeming very harſh to ſuch as do not throughly graſp the Reaſons of things, to hear it ſaid that an honeſt juſt Cauſe was loſt, for matter of Form, or becauſe of the Errror or Ignorance of a Clerk; And that Law in ſuch a Caſe is one way, and Conſcience and Equity another way. And theſe things ſeem often times in particular Caſes to be very miſchievous. But when it ſhall be conſider'd, That this way of being tyed cloſe, even by an Oath, to ſtrict Rules, is that which preſerves us from *Arbitrary Judgments*, and keeps all things Certain, and that many particular Miſchiefs are rather to be tolerated, then the great and common Inconveniencies endured, of Truſting any Judges whatſoever, with an *Arbitrary Power*. And that for the Relieving even of particular Perſons againſt ſuch miſchiefs as may happen from the *Cloſe Obſervance* of theſe ſtrict Rules, our Government hath appointed Courts of Equity; No one can reaſonably Complain that they are hurt or Injured. Now it is conceived, that the reaſon of this way of Proceeding in our Judges in the Poynt objected, was not that they judged the King to have no Power to Diſpence with Penal Laws, for the Publick-Good, and when Neceſſity and Reaſon of State required; but they were tyed up by their Oaths, as is before-mention'd: And conſequently were bound not only to conſider the ſubſtantial part, whether by the King's ſole *Power*, the Execution of *Penal Laws* upon Grounds warranted by Law, might be Suſpended; But they were alſo to Conſider the Form and Manner of the King's Executing of this *Power*. And if the ſame were not done in ſuch manner as the Rules of *Law* required, they could not legally be ſo bound by it as to be Excuſed from giving thoſe Statutes in Charge, though they might otherwiſe have a *Liberty* ſo far to comply with the *Publick-Good*, and with what the King (whom the *Law* hath conſtituted Judge of what is ſo) judged to be neceſſary for the *Publick-Good*, as not rigorouſly to compell the Execution, of what they were nevertheleſs bound by their Oaths,

to give in Charge. And this is conceived to be the true State of the preſent Caſe urged in the Objection, which rightly underſtood makes nothing againſt the King's Right here affirmed, and juſtifies the Prudence and High Integrity of the Lords the Judges. The King found it abſolutely neceſſary, for *Common-Good*, being to Engage in a moſt neceſſary War, to ſuſpend the Execution of ſeveral Penal Laws: The Reſolution taken in the Caſe was upon ſerious Debates, had with his Miniſters of State, it being purely an Affair of State, conſequently his Majeſties Counſel of Lawyers were not conſulted in the Poynt, it not being within their Cognizance to Adviſe in Affairs of State, ſuch as are the making of Peace or War, *&c.* Nor do they think themſelves diſparaged in being omitted out of Conſultations of this nature. The King upon this Advice reſolves upon the thing as neceſſary; and finding in common practice, That it was not to be doubted but that he had a Power inherent in him to do this: His Majeſty having formerly Exerciſed this Right, in the aforeſaid Caſes of Suſpending the Execution of ſeveral Laws made in Relation to *Cart-Wheels*, *French-Wines*, &c. In all which his Counſel of *Lawyers* had prepared and drawn up the Inſtruments, by which the ſame were Suſpended, and no Complaint or Exception was ever taken againſt the ſame, by any of the Judges, or by the Parliament. The form of doing this was by his Majeſty left to his Miniſters of State, becauſe it being matter of State, it lay moſt properly within their Sphere to expreſs the Reaſons which were therein to be ſet forth for the doing what was to be done. Theſe *S*tates-men being ſolely uſed to conſider matter of Subſtance, and being mere Strangers to matters of Form, and conſequently not reflecting upon matter of Form as neceſſary; drew up the Inſtrument by which this Suſpenſion was to be Executed by the way of a Declaration, and thought the paſſing of that Declaration in Council by his Majeſty, and the Publiſhing the ſame in *P*rint, being in their Judgments the ſole matter of ſubſtance, was all that was neceſſary in this Affair. But it happened in this Caſe that for want of Adviſing with his Majeſties Attorney General, by whom thoſe Inſtruments were prepared, which ſuſpend the Execution of thoſe other Laws, there was ſomething amiſs in this; So that it came not ſo Legally and in ſuch Form to the Judges, as thoſe others did; conſequently they could not by reaſon of their Oaths, omit to give in Charge the Laws intended

ded to be ſuſpended by this Declaration. Yet they took care (like moſt prudent Perſons, and moſt Loyal and Dutiful Subjects) not to preſs the rigorous Execution of any one of thoſe Laws, becauſe the King had declared his Royal Judgment, That the Execution of them was to the prejudice of *Common-Good*. Nor yet did they proceed to declare any Reaſon why they continued to give the ſame in Charge, nor to declare any Negative Opinon, that the ſame were not Suſpended: But left all men to conjecture from their not preſſing the Execution of any of thoſe Laws, that the ſame were in Truth ſufficiently Suſpended in ſubſtance. And yet that there was ſome Defect in the legal Form of that Declaration, ſo that they were in their Opinions not excuſed from giving the ſaid Statutes in Charge: And this was rightly taken by the whole Kingdom, none of thoſe Laws were put in Execution, but *Publick Good* was complyed with. And clear it is, the whole Kingdom was thereby in the greateſt Peace and Quiet, that it had enjoyed in the memory of man: All the Deſigns and Contrivances of the *Dutch* for putting our Nonconformiſts into Diſorders, and breaking our Publick-Peace, were prevented, to their great Aſtoniſhment and Confuſion; And our Reverend Judges by this their great Wiſdom, preſerved the King's Honor, conformed unto, and complyed with his Royal Intention, juſtified his Right in the ſubſtantial part of it; and preſerved themſelves from all poſſibility of being blamed either by his Majeſty, or by the Parliament. And by this are eaſily reconciled the Carriages and Proceedings of the Judges in this particular poynt; wherein to thoſe who do not conſider things well, they ſeem to have diſallowed the King's Right of Diſpenſing with Penal Laws. And their Carriages and Proceedings in the other Caſes, where the King ſuſpended the Laws relating to *Navigation*, to *Importation of French-Wines*, and to *The Breadth of Cart-Wheels*; none of which were ever Executed, or given in Charge ſince the Execution of them were ſuſpended by Proclamations drawn up and prepared by his Majeſties Attorney General, and paſſed under the Great Seal of *England*, and ſo made matter of Record before they were publiſhed in Print.

Object. XII. *Admitting our Judges in Favour of our Kings, whose Officers they were, to have countenanced this Right, and that our Parliaments have been silent without Complaining of the Exercise thereof, as to particular Persons, as not esteeming it inconvenient to admit the King a Power to gratifie single Persons; yet no Parliament ever allowed the King to have a Right of Dispensing, even as to particular Persons, much less as to General Dispensations: and the Exercise of such a Power would in a great measure render Parliaments useless.*

Answ. I. This inconveniency of the King's having this Right, as to General Dispensations, is less than his having the same, as to particular Persons. For it may happen, That Dispensations to particular Persons, may by the indirect means of Gifts bestowed on the Procurers of them, be Granted upon false suggestions, and the King be deceived in his Grants of them, without any Default in the King: But general Dispensations cannot be supposed to be made but upon great Advice, and as the Effects immediate of the King's Judgment. These therefore were never by our Law, submitted to the Judgments of our Judges, as being grounded always upon Reason of State, Publick Good, and Necessity, of which our Judges never take upon them to judge, but rely as to the matter of Fact, upon the King's Judgment: But particular Dispensations have been in all Ages under the Judgment of our Judges, so as to judge whether they are well-grounded, or not, and whether the King were deceived in his Grant, or not. *Secondly*, As to the Allowance of this Right, in either Case, by Parliaments; If it be meant That the same was not Originally Granted to the Crown by Parliaments, it is Agreed, for if it were, it might then be taken away by the same Authority, which it is proved that it cannot be. But if by the Objection it be only intended, That it hath not been admitted by Parliaments, then the Objection is denyed. And for justification of the Denyal, as to the King's Right of Dispensing with particular Persons, these two instances will serve: First in the Act of Parliament before cited, which endeavoured to Bar the Crown of the Exercise of this Right, it must be agreed That it was admitted by that Parliament, That the King had this Right, otherwise it had been vain, to provide against the

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Exerciſe of it, in Diſpenſing with that Statute, nay the endeavour to bar the Exerciſe of it, in that ſingle Point, proves, that they admitted he might lawfully Exerciſe it as to other Penal Laws, and that they conceived he might have Exerciſed it ſo as to Diſpenſe with that alſo, in caſe they took not care to bar him. The Statute intended is that of 23. *H.* 6. *c.* 8. By which it is made Penal for any one to Accept of and Execute the Office of Sheriff of one County twice: And it is thereby expreſly Enacted, That every Pardon, then after made for ſuch Offence, and for ſuch Forfeiture, ſhould be void, and all Patents made to the contrary ſhould be void; Notwithſtanding any Clauſe of *Non obſtante* (that is any Diſpenſation) therein to be contained. This clearly is an admittance, That the King had this Right: But it is alſo further Remarkable upon this Statute, That the better to bar the King of the Exerciſe of this Right, as to this Law, this particular Act gives Power to the Proſecutor to bring his Action for the Recovery of the Forfeitures in his own name, intending doubtleſs not to have the King's Name uſed, and thereby to bar the King's Attorney from helping the Defendant, by a *Non vult ulterius proſequi.* Yet notwitſtanding all this Solicitude and Care taken, the Law hath adjudged (as is before proved) That neither this Act, nor any other Power whatſoever; could bar the King, from diſpenſing with this Law, nor from uſing the Service of any Subject, in any Office; nor could the Subject be liable to any Penalty by this or any other Statute, for Serving the King in any Office upon the King's Command. The King being Entituled to the Service of every Subject, by the Law of Nature, by which Law every Subject owes a Legeance to the King, which Rights being inherent and inſeperable, they cannot be taken off by any Acts of Parliament. The Second Inſtance for proving the King's Right of Diſpenſation, as to particular Perſons (and peradventure it may prove the ſame as to general Diſpenſations alſo) to have been admitted by Parliament, is full and expreſs in the Poynt: It is *Rot. Parl.* 1. *H.* 5. 11. 22. cited by *Rolle* (a moſt avowed Enemy to the Crown) *Tit. Prerogative le Roy. fol.* 180. the words thus: *The Commons prayed, That the Statutes for voyding of Aliens out of the Kingdom, might be Executed: to which the King agreed, ſaving his Prerogative, That he might Diſpenſe with ſuch as he pleaſed. And upon this the Commons Anſwer'd, That their Intentions was no other, nor ever ſhould be,*

by the help of God. Now if this Prerogative of Diſpenſing with *ſuch* as the King pleaſed were intended (as it was reaſonable it might be) to Diſpenſe with all of any particular Nation in caſe he pleaſed, and any Articles of *League* required it, (as they might well do, and in which Caſe the Non-performance would have occaſion'd a War) then this Inſtance proves an Admittance of the King's Right, as to General Diſpenſations. But if it be otherwiſe underſtood only, as to Diſpenſe with ſingle perſons, it is at leaſt a clear and ſolemn Admittance of that Right. And as to the King's Right of Diſpenſing Generally, it is proved before to be Admitted by the whole Kingdom in the Caſes of his now Majeſties Diſpenſations in Relation to the Importation of French Wines, and the Statutes relating to Navigation, and the breadth of Cart-Wheels; to which may be added the known Caſe of the King's General Diſpenſation with ſeveral Penal *Laws* made in Relation to a Matter Eccleſiaſtical: It is in the poynt of keeping of *Lent*, and Faſting, Enjoyned by the King's Eccleſiaſtical *Laws*, the Cannons of our Church; and farther Enforced under ſeveral Penalties by the Statutes of 2. &. 3. *Ed.* 6. *c.* 19. & 5. & 6. *Ed.* 6. *c.* 3. & 5. *Eliz. c.* 5. In the firſt there is a Saving to ſuch as ſhall be *Li*cenſed by the King (which if it be intended of Licenſes to particular Perſons will not concern the preſent poynt) in the ſecond there is no ſaving. In the third, there is a particular ſaving limited and reſtrained to particular Caſes, and Conditions, as to *Licenſes*. All theſe Laws are Generally Diſpenſed with, by the King's General Diſpenſation, by his Proclamation, and this is admitted to be Legal by the Admittance of our preſent Parliament; and of all our Eccleſiaſticks, Judges, Lawyers, and the whole Kingdom in General, by an Univerſal Admittance, not queſtion'd, or complained of by any. *Thirdly*, As to the cloſe of the Objection, which pretends, That the Allowance of this Right to the King, will in a great meaſure render Parliaments Uſeleſs: The Anſwer is, *Firſt*, our Law-Books ſpeak not of Licenſes or Diſpenſations general or particular by Parliament, but by the King, the King's Right is to Diſpenſe, the *P*arliament to Repeal. *Secondly*, It is for the Eaſe of the Kingdom, that the Conſtitution of the Government is thus, For the neceſſity of Diſpenſations in ſeveral Caſes, where our Penal Laws are ſo numerous, requires, that the Power of Diſpenſing with Penal Laws, ſhould be in ſome

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Perſon or Perſons always viſible, and in being, which cannot be a Parliament, without a vaſt Expence and Inconveniency to the Kingdom, who are by the Conſtitution of our Government, to bear the Charges, and allow Wages to the Members Choſen, and ſent by them to Sit in Parliament: And therefore it is, That our Law puts the Power of Diſpenſations, which are but Temporary, in the King, That the Total Repealing (if neceſſary) may attend the calling and meeting of a Parliament, when other weighty Affairs ſhall require a Parliament to be called. It would be intollerable to trouble the Kingdom with the calling of Parliaments ſo often as there is occaſion, for Publick Good, to Suſpend the Execution of a Penal Law; in the mean time the Publick cannot ſuffer in regard the Law hath well provided for it, by putting this Power in the King. So that Parliaments continue ſtill to be uſeful, notſtithſtanding this Power be in the King. And this Power being in the King, by the Conſtitution of our Government, which hath placed the power of Repealing Laws, in the Parliament, as it would render Parliaments uſeleſs, to put the Legiſlative Power in the King ſolely, which is of the Eſſence of a Parliament. So to put thoſe Powers into a Parliament, which are of the Eſſence of King, would render our King uſeleſs. Our Government hath long continued and ſubſiſted happily by the ſeveral and diſtinct Exerciſes apart by our Kings and Parliaments, of their ſeveral and diſtinct, proper, and eſſential Rights peculiar to each other: And when either ſhall uſurp upon the other, our whole Government and Laws muſt be deſtroyed; and let the Objectors Judge whether that would endanger our Liberties and Properties.

Object. XIII. *If this Right, and the Powers of the Militia, and of Peace and War, and of making Leagues, were to be Exerciſed only by his now Majeſty, the Kingdom would not think it ſelf unſafe by entruſting him. But, to have this Power, and thoſe others inherent in the Crown, which may deſcend to One, who may be a Tyrant, or of a Religion contrary to what we now Profeſs, may be deſtructive to our Religion and Laws, And therefore if our Laws do veſt theſe Powers in the Crown, as is inſiſted, theſe Laws are thus far defective, and ought to be altered. Theſe Powers not being fit to be Exerciſed, but by Parliament only, and to be veſted in the Parliament.*

Anſw. I. This Objection upon pretence of Securing our Religion, labours to make it odious, by propoſing to make us violate all thoſe Oaths, which oblige us to be True and Faithful to the King, his Lawful Heirs and Succeſſors, without any Reſervations or Conditions, in relation to the good Government, or Religion of ſuch Lawful Heirs. So that in Effect it propoſes to us to break Faith with the Heirs of the Crown, when ever we ſhall judge them to be Tyrants or Hereticks, and to become Rebels in order to the Defence or Security of the True Religion; which Principles our Religion profeſſeth to abhor. *Secondly*, This Objection alſo tends to put us into a perpetual ſtate of War and Blood, into a deſperate hazarding of our Eſtates, Lives, Laws, Liberties, Country and Religion, upon a Pretence of endeavouring to ſecure our Religion and Laws. That theſe muſt be the Conſequences is unavoidable; For if it ſhould be ſuppoſed, that his now Majeſty to gratifie the preſent Objectors, and to prevent the objected Dangers, which are pretended may in poſſibility happen from theſe Powers reſting in the Crown, ſhould agree to depart (as much as in him lyeth) with ſo much of his Crown as is here deſired, and after that, even with his whole Crown. And that thereupon the whole frame of our Government ſhould be Altered, as far as the wit of man can contrive to Alter the ſame, yet there can be no Security, but that his Majeſty may repent, and endeavour by Force, or otherwiſe to retrieve all that is thus departed with. If he attempt this by Force, there muſt be neceſſarily a War, which proves the Truth of what is here Anſwered: If he can do it without War, he will not want a Preſident to Warrant his Repealing all ſuch Alterations by his Letters-Patent. The Caſe is cited by *Rolle*, *Tit. Prerogative le Roy. fol.* 165. where he ſays: That in the Statutes at large, 15. *Edw.* 3. The King revokes by his Letters Patent with the Aſſent of his Earls, Barons, and other wiſe Men of his Realm, certain Statutes made before in the ſame Year; Becauſe they were contrary to the Cuſtoms of the Realm, and his Prerogative Royal, and Aſſented to by him by Diſſimulation in Caſe of neceſſity. And (ſaith *Rolle*) thoſe Statutes have been reputed as Repealed ever ſince. The Letters Patent by which theſe Statutes were thus Repealed, are Printed in the Statutes at Large, in *Anno* 15. *Edw.* 3. a Copy of which is at the end of this Anſwer to this Objection. Wherefore the Dangers from his

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now Majſties repenting, will prompt the Objectors, to farther and worſe Fears, not to be removed untill his Majeſtie and all who may be feared within the Kingdom, be put into ſuch a condition as to ceaſe to be Objects of Fear. And yet when this is done, The Dangers are not paſt. For *Rex nunquam moritur nec mori poteſt.* The King of *England* in his Politick Capacity is as Immortal as the World. We ſhall but make our Selves a Prey to that Neighbouring Prince who is Strongeſt, and the Strongeſt Prince will certainly make himſelf an Undoubted Title to the Crown of *England*, let his Religion or Temper be what it will. For if *England* could not ſubſiſt a Republick when it had *Holland* to Aſſiſt it: It cannot be, but That the Crown of *England* will have an Heir, now *Holland* is diſabled from Abetting any Change of Government.

The Copy of the Letters Patent.

EDWARD by the Grace of God, &c. To the Sheriff of Lincoln, Greeting.

WHereas att our Parliament ſummoned att Weſtminſter in the xv. of Eaſter laſt paſt, certain Articles expreſsly contrary to the Laws and Cuſtomes of our Realme of England, and to our Prerogatives and Rights Royal were pretended to be Granted by us by the manner of a Statute; we conſidering how that by the bond of our Oath wee be tied to the obſervance and defence of ſuch Laws, Cuſtomes, Rights, and Prerogatives, and providently willing to revoake ſuch things to their own State, which be ſoe improvidently done; upon conference and treatiſe thereupon had with the Earles, Barons and other wiſe men of our ſaid Realme; and becauſe we never conſented to the makeing of the ſaid Statute, but as then it behoved us, we diſſimuled in the premiſſes by proteſtations of revocation of the ſaid Statute, if indeed it ſhould proceed, to eſchew the dangers which by the denyeing of the ſame we feared to come, forasmuch as the ſaid Parliament otherwiſe had been without diſpatching any thing in diſcord diſſolved, and ſoe our earneſt buſineſs had likely been ruinated which God prohibit. And the ſaid pretended Statute we promiſed then to be ſealed. It ſeemed to the ſaid Earls, Barons, and other wiſe men, that ſithence the Statute did not of our free will proceed, the ſame be void, and ought not to have the name nor ſtrength of a Statute. And therefore by their counſel and aſſent wee have decreed the ſaid Statute to be void, and the ſame in as much as it proceeded of deed we have agreed to be annulled; willing nevertheleſs that the Articles contained in the ſaid pretended Statute, which by other of our Statutes, or of our Pregenitors Kings of England, have been approved, ſhall according to the form of the ſaid Statute in every point as convenient is, be obſerved. And the ſame we do only to the conſervation and reintegration of the rights of our Crown, as we be bound, and not that we ſhould in any wiſe grieve or oppreſs our Subjects, whom we deſire to rule by lenity and gentleneſs. And therefore we do command thee that all theſe things thou cauſe to be openly proclaimed in ſuch places within thy Bailiwick, where thou ſhalt ſee expedient. Witneſs my ſelf at Weſtminſter, the firſt day of October, the fifteenth year of our Reign.

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now Majesties repenting, will prompt the Objectors, to further
and worse Fears, not to be removed until his Majestie and all
who may be feared within the Kingdom, be put into such a
condition as to cease to be Objects of Fear. And yet when this
is done, The Dangers are not past. For Rex nunquam moritur
very point. The King of England in his Politick Capacity is as
Immortal as the World. We shall but make our Selves a Prey
to that Neighbouring Prince who is Stronger, and the Stronger
Prince will certainly make himself an Undoubted Title to the
Crown of England, let his Religion or Temper be what it will.
For if England could not forbid a Republick when it had Hollond
to Affist it: It cannot be, but That the Crown of England
will have an Heir, now Holland is disabled from Altering any
Change of Government.

The Copy of the Letters Patent.

D WARD by the Grace of God, &c. To the Sheriff of
Lincoln, Greeting.

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